Supreme Court, U.S.
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No. _____

In The
Supreme Court Of The United States

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OCTOBER TERM

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EDWARD M. MITCHELL,

Petitioner,

V.

TOTAL ACTION AGAINST POVERTY IN ROANOKE VALLEY/HEAD START,

Respondents,

◆

On Petition for Writ of Certiorari to the
United States Courts of Appeals for the Fourth Circuit

◆

PETITION FOR WRIT OF CERTIORARI

◆

EDWARD M. MITCHELL
1570 16th ST., NW
ROANOKE, VA 24017
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4300

QUESTIONS PRESENTED FOR REVIEW

1. Was Mr. Mitchell the victim of sexual discrimination and retaliation on the part of Total Action Against Poverty In Roanoke Valley/Head Start?

2. Was there a bias in the way the United States District Court for the Western District of Virginia Roanoke Division and United States Court of Appeals for the Fourth Circuit look at sexual discrimination and retaliation cases involving men as opposed to women? Does the court believe men filing such cases do so because they are too sensitive?

3. Are companies liable for harassment and sexual discrimination when supervisors make degrading remarks toward their employees? Does the same hold true in cases of retaliation?

4. Can supervisors justify making derogatory remarks toward her employees based upon outside events in a supervisors personal life? Can Ms. Hooper of Total Action Against Poverty In Roanoke Valley/Head Start justify making degrogatory remarks toward Mr. Mitchell based upon a traumatic event in her life in which she is receiving counseling?

5. Did Total Action Poverty In Roanoke Valley/Head Start dismiss Mr. Mitchell in retaliation for requesting the derogatory statements made against men by his female supervisors to end? Was Mr. Mitchell dismissed by his female supervisors without regard to his work record, job evaluations and personal life?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A lost of all parties to the proceeding in the court whose judgment is the subject of his petition is as follows:

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

EDWARD M. MITCHELL,
Plaintiff-Appellant.

v.

TOTAL ACTION AGAINST POVERTY IN ROANOKE VALLEY/HEAD START,
Defendants-Appellees.

No.98-2546

Appellant, Edward M. Mitchell, by counsel, submits the following as his Reply Brief of Appellant in response to Brief of Appellee, Total Action Against Poverty in Roanoke Valley/Head Start, and in further support of his appeal of the Final Order and accompanying Memorandum of Opinion dated September 11, 1998, entered by the Honorable James C. Turk, United States District Judge of the United States District Court for the Western District of Virginia, Roanoke Division, which granted Appelle's Motion for Summary Judgment. To facilitate and to organize Appellant's reply to Brief of Appellee, Appellant will utilize the same headings as Appellee and offer Appellant's response accordingly.

MITCHELL'S SEXUAL DISCRIMINATION CLAIM (Appellee's Brief at 11)

Appellee argues that Appellant has no direct evidence of gender discrimination nor can he establish a *prima facie* case pursuant to the proof scheme of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Appellee's Brief at 11. Further, Appellee states that because Appellant was such a miserable employee, which Appellee incorrectly argues is uncontested, and because he was replaced by a man, which his position was

eventually filled by a man, he also cannot meet the McDonnell Douglas Burdine proof model.

Appellant presented both direct evidence of gender discrimination and established a prima facie case of discrimination before the Honorable James C. Turk in defense of Appellee's Motion of Summary Judgment. Evidencing a negative, hateful attitude against men in no uncertain terms, Appellant's supervisor, Carolyn Hooper, said in Appellant's presence through 1993 to 1994 that "All men are dogs," and "Men are harder to deal with than women." Moreover, when these derogatory comments were made, Appellant made his protestations known and informed his supervisor that he was offended by these comments, yet they continued to be made. Soon after Hooper made these comments and after Apellant made known to Hooper his strong objections to these offensive comments, Hooper did not give Appellant at his June 1994 evaulation a pay increase because she felt that he opposed her authority, despise a satisfactory evaluation. This direct evidence of sexual discrimination.

Regarding the elements of the McDonnell Douglas-Burdine proof scheme, there is a significant factual dispute as to Appellant's work performance that affects the third element of the prima facie proof scheme and the second prong of the proof scheme which shifts the burden to the Appelle to show a legitimate, nondiscriminatory reason for terminating Appellant. Appellee asserts that despite promoting the Service Manager in 1992 and despite the fact that his personnel file remained spotless until he was placed on probation in October 1994, Appellant was not the right person for the Service Manager's position because of his managerial inexperience and because his job performance was miserable as a Service Manager from day one. This is simply an illogical, baseless assertion. In June 1994, Hooper formally evaluated Appellant for the first time since he became a Service Manager. His job performance was satisfactory. App at 397. For almost two years from the day he first became Service Manager. There was not one memorandum, not one write-up, not one written negative comment about his job performance in his personnel file, that is until October 7, 1994, when Hooper placed Appellant on probation mainly because of the condition of the Vinton Center, which was *after*

Hooper made all the sexist comments, *after* Appellant protested these derogatory comments about men, *after* Hooper denied his pay increase because Appellant opposed her authority, and *after*

Appellee had requested federal funding to renovate the dilapidated Vinton Center.

After the October 7, 1994, probation, Appelle's view of Appellant's job performance through the disturbed eyes of Hooper, took a spiral downward turn giving the appearance of justification to terminate him on January 23, 1995, despite the fact that just prior to his termination, Hooper placed Appellant on a second probation, and then on January 20, 1995, Hooper rescinded that probation by letter in which she stated, "At your next performance appraisal meeting, we will review these concerns as to whether or not improvement has been made." App at 422. After October 7, 1994, Hooper heavily scruntinized Appellant's work performance. An employee who had been satisfactory employee/manager for the preceding two years, suddenly could do no right. Appellant is entitled to the reasonable inferences that because Appellant was intolerant of Hooper's sexist remarks and because Hooper was perceived Appellant as a threat to her authority, Hooper decided to get rid of Appellant. To do so, Hooper used the already poor condition of the Vinton Center against Appellant to prop up the October 1994 probation; and thereafter, placed Appellant's job performance under a microscope to garner evidence in order to support his eventual, predestined termination, which Hooper successfully accomplished, through her strong recommendations on January 23, 1995

Appellant has proven and met the *prima facie* element for showing that his job performance was adequate, as his June 1994 evaluation clearly demonstrates, before Hooper began her barage of discriminatory, retaliatory actions against Appellant. Appellant's job performance after the October 1994 probation is an issue of material fact to be left to the jury—that is whether his job performance was poor as Appellee claims or whether it was manufactured by a sexist supervisor who did not like Appellant's protestations against her sexist remarks and who wanted

Appellant fired. Job performance is at issue in this case: Appellant should be allowed to present his evidence at trial, so that the fact-finding jury may draw all reasonable inferences therefrom.

After Appellant's termination, Paul Moyer eventually filled the position as Service Manager. Both Appellee and the District Court state that this fact, and this fact alone, is fatal to Appellant's claim of gender discrimination under the McDonnell Douglas proof scheme. Both Appellee and the District Court ignored Appellant's argument and the facts in this case that Hooper singled Appellant out as a male for mistreatment because Appellant spoke out-he defended his gender, and he defended himself when he told Hooper that he found her comments against men offensive and to not make those types of comments against men in his presence. Only after his protestations did the mistreatment begin and the complaints about his job performance commence. In this specific case, it matters not who replaced Appellant as Hooper singled out the protesting man, not all men. To apply the McDonnell Douglas test stringently and in a vacuum would be contrary to caselaw, would ignore the facts in this case, and would violate Appellant's right to have his case heard on the merits.

Appellee's argument that the comments, "All men are dogs" and "Women are easier to deal with than men," are just office banter and are just mere words that are deemed innocuous and insufficient to prove discrimination pursuant to Mathis v. Perry, 996 F. Supp. 503 (E.D. Va. 1997), is troublesome, to say the least, and unsupported by Mathis. First, this case does not present mere words as the only evidence to support the claim of gender discrimination as Appellee falsely suggests. Secondly, if a Caucasian person stated in the work place that "All blacks are dogs" or " Blacks are harder to deal with than whites, "the Africian-American, bringing a suit for race discrimination, would surely not be accused of "being too sensitive" as Judge Turk said to Appellant at the hearing on Appellee's Motion for Summary Judgment, and surely Appelle would not be labeling these comments as mere office banter. Let us not be sexist in the way we treat a man who brings a claim of gender discrimination by treating his claim differently than we would any

other discrimination claim and by expecting him to have thicker skin merely because he is a man.

In this case and unlike the factual situation in Mathis, there are derogatory, sexist comments directly focused on a protected class, there is a member of the protected class who makes his protestations about these comments known to the offending supervisor, there is an expression of irritation from the offending supervisor to the member of the protected class that directly corresponds to the supervisor's decision to not give a pay raise to the member of the protected class, and there are subsequent actions taken by the offending supervisor against the member of the protected class—a probation, a second probation, a rescission of the second probation two days later, and then a termination of the next business day after the rescission. These comments are not "inconsequential" as in the case of Mathis, and do provide the beginning point for the subsequent acts of discrimination against Appellant by Appellee.

MITCHELL'S RETALIATION CLAIM (Appelle's Brief at 19)

Without belaboring this issue, again Appellant states that the retaliation claim is part and parcel of his claim of gender discrimination. Hooper retaliated against Appellant after he told her not to make those sexist comments in his presence. Thereafter, Hooper made a statement that she did not like Appellant opposing her authority without detailing her meaning, even when asked; Hoooper thereafter denied Appellant's pay raise because he opposed her authority; Hooper then placed Appellant on probation for the "unsafe" condition of an already unsafe, dilapidated center for which Appellee had just months prior applied for federal funding; Hooper then heavily scruntinized his job performance for the next three months, while Appellant was on probation; and Hooper eventually recommended Appellant's termination, which was supported without question by upper management. This chain of events is not only discriminatory but also retaliatory based upon Appellant's gender. The District Court erred by granting Appellee's summary judgment motion on the retaliation claim.

CONCLUSION

Based upon the foregoing and upon the Brief of Appellant, Appellant, Edward M. Mitchell, by counsel, respectfully requests that this Court of Appeals reverse the District Court's Final Order dated September 11, 1998, and remand this case to the District Court for a trial on the merits.

EDWARD M. MITCHELL

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CERTIFICATE OF MAILING

I, Bettina C. Altizer, Esq., hereby certify that the Original and seven (7) copies of the foregoing Reply Brief of Appellant were mailed to the Clerk of The Court of Appeals of Virginia on January 12, 1999, and that one (1) copy of the Reply Brief of Appellantt was mailed first-class postage pre-paid to JONATHAN ROGERS, P.C., P.O. Box 2886, Roanoke, VA 24001-2886, counsel for Appellee, on this 12th day of January, 1999.

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DOCKET NO.98-2546

EDWARD M. MITCHELL,

Appellant,

V

TOTAL ACTION AGAINST POVERTY
IN ROANOKE VALLEY/HEAD START,

Appellee.

REPLY BRIEF OF APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT COURT

EDWARD M. MITCHELL,
Plaintiff-Appellant.

v.

TOTAL ACTION AGAINST
POVERTY/HEAD START *Defendant Appellee.*

and

CAROLYN D. HOPPER; CLEO C. SIMS,
Defendants.

No.98-2546

Appeal from the United States District Court
for the Western District of Virginia, at Roanoke.
James C. Turk, District Judge.
(CA-96-787-R)

Submitted: March 23,1999

Decided: April 20, 1999

Before WILKINS, LUTTIG, and MICHAEL, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

Bettina C. Altizer, Jack Vernon Altizer, ALTIZER & AP.C., Roanoke, Virginia, for appellant, Jonathan Rogers, JONATHAN ROGERS, P.C., Roaoke, Virginia, for Appellee.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
June 9, 1999

No. 98-2546

CA-96-787-R

Mitchell v. Total Action

MANDATE

The judgment of this Court dated 4/20/99 effects today.

PATRICIA S. CONNOR
CLERK

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
June 1, 1999

No. 98-2546
CA-96-787R

EDWARD M. MITCHELL

Plaintiff – Appellant

v.

TOTAL ACTION AGAINST POVERTY/HEAD START

Defendant – Appellee

And

CAROLYN D. HOPPER; CLEO C. SIMS

Defendants

ORDER

Appellant has filed a petition for rehearing.

The Court denies the petition for rehearing.

For the Court

/s/ Patricia S. Connor

CLERK

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

EDWARD M. MITCHELL,

Plaintiff,

v.

TOTAL ACTION AGAINST POVERTY IN ROANOKE VALLEY/HEAD START,

Defendant.

Civil Action No. 96-0787-R

MEMORANDUM IN SUPPORT OF PLAINTIFF'S REPLY TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

COMES NOW, Plaintiff, Edward M. Mitchell, by counsel and files his Memorandum in Support of his Reply to Defendant, Total Action Against Poverty in Roanoke Valley/Head Start's Motion for Summary Judgment, and requests that this Court dismiss Defendant's Motion for Summary Judgment, and in support thereof states as follows:

II. INTRODUCTION

This is a Title VII action setting forth gender discrimination and retaliation based upon gender discrimination. This matter is now before the Court on Defendant's Motion for Summary Judgment. Plaintiff requests that this Court deny Defendant's Motion for Summary Judgment filed herein as there are issues as to material facts.

II. STATEMENT OF THE CASE

Plaintiff filed a claim with the United States Equal Employment Opportunity Commission (hereinafter "EEOC") on April 25, 1995, citing that Defendant had discriminated against him based upon his gender and had retaliated against him because of his gender. On June 6, 1996, the EEOC issued a *Dismissal & Notice of Rights*, stating that "the Commission is unable to conclude that the information obtained establishes violations of statues. This does not certify that the respondent is in compliance with the statues. No finding is made as to any other issues that might be construed as having raised by this charge." The EEOC gave Plaintiff the "notice of right to sue," allowing him ninety days to bring suit.

On August 29, 1996, Plaintiff timely brought suit against Defendant, Total Action Against Poverty in Roanoke Valley/Head Start, and against Carolyn Hooper and Cleo C. Sims.

Defendants filed a Motion to Dismiss on various grounds. Plaintiff moved to file an Amended Complaint. The Court granted such motion, and Plaintiff filed his Amended Complaint reasserting his sexual discrimination and retaliation claims while eliminating the 42 U.S.C. 1981 and 42 U.S.C. 1983 claims and proceeding against Defendants, Carolyn Hooper and Cleo C. Sims.

Pursuant to this Court's Order dated May 1, 1998, the discovery cutoff deadline was July 1, 1998

III. STATEMENT OF FACTS

Plaintiff is an Africian-American male, age fifty-five, and was born on April 26, 1943.

Defendant is a federally-funded agency that provides education, housing, community outreach, and offender programs for poverty-stricken individuals. Defendant employs over one hundred individuals.

Plaintiff began to work for Defendant in September of 1987 as a maintenance technician. His duties as a maintenance technician were to assist in the maintenance and repair of Defendants various schools, structures, and playgrounds. Plaintiff Affidavit a 1. Plaintiff met all standards of performance as a maintenance technician as his employment evaluations from 1987 to 1992 were above average. Plaintiff Affidavit at 2. Defendant promoted Plaintiff on August 17, 1992, to Service Manager. His job as a Service Manager entailed supervising approximately fourteen employees and was primarily a managerial position requiring little to no hands-on laborious work. Plaintiff Affidavit at 2.

As Service Manager, Plaintiff's evaluations were above-average. Plaintiff Affidavit at 2, Exhibit A. Ms. Hooper became the supervisor of Plaintiff on or around June 1993. Just prior to becoming Plaintiff's supervisor, Ms Hooper made derogatory comments about men, such as "all men are dogs." Defendant's Appendix, Exhibit 5 at 3; Plaintiff Affidavit at 3. Plaintiff states that Carolyn Hooper made the comment that "all men are dogs" on several different occasions. Plaintiff Affidavit at 3. Ms. Hooper's derogatory, sexist statements about men were made in Plaintiff's presence both before and after she became Plaintiff's supervisor. Carolyn Hooper also made the comment that "men are harder to deal with than women" in a staff meeting while Plaintiff was present and after she become Plaintiff's supervisor. Plaintiff Affidavit at 3.

The first time that Carolyn Hooper made the sexist comment that "all men are dogs." Plaintiff told her in no uncertain terms that he did not appreciate that kind of comment, that it was offensive, and requested that she not make such comments in his presence again. Plaintiff Affidavit at 3. Yet, Carolyn Hooper continued to make these sexist comments in the presence of Plaintiff. Plaintiff Affidavit 3. On several occasions thereafter in 1993 and 1994, Carolyn Hooper referred to men as dogs. Plaintiff Affidavit at 3. Again, Plaintiff protested. Plaintiff Affidavit 3. When Plaintiff made such protestations against these sexist comments, Carolyn Hooper became agitated. Plaintiff Affidavit at 3.

Prior to making these sexist comments about men, Carol Hooper had been attacked and repeatedly stabbed by her boyfriend. Defendant's Appendix, Exhibit 5 at 3, Plaintiff Affidavit at 3. She underwent counseling to help her deal with her anger toward men. Defendant Appendix, Exhibit 5 at 3; Plaintiff Affidavit at 3. Prior to Carolyn Hooper making these derogatory, sexist comments about men, Plaintiff's work performance was above average. Plaintiff Affidavit at 3. Plaintiff's June 1994 evaluation was conducted by Carolyn Hooper was a positive, good evaluation revealing a satisfactory job performance as Service Manager. Plaintiff Affidavit at 3, Exhibit B. In that evaluation meeting, Carolyn Hooper told Plaintiff that he would not receive a pay increase because she felt that Plaintiff had opposed her when she became his supervisor and opposed her authority. Plaintiff Affidavit at 3. Plaintiff objected to the denial of a pay increase based upon Hooper's allegation of opposition. Plaintiff Affidavit at 4. Hooper suggested that Plaintiff meet with her supervisor, Cleo Sims. Plaintiff met with Cleo Sims regarding Carolyn Hooper denial of a pay increase because she felt that he opposed her when she became his supervisor. Plaintiff Affidavit at 4. Cleo Sims stated that she would stand by Carolyn Hooper's decision not to give Plaintiff a pay increase. Plaintiff Affidavit at 4.

On and prior to the June 1994 evaluation, Plaintiff's job performance as a Service Manager was not perfect; however, it was satisfactory to above-average. Plaintiff Affidavit at 4. As a Service Manager and prior to his June 1994 evaluation, Plaintiff had received no formal reprimands, had not been placed on probation, and had not been formally cited for poor or inadequate job performance. Plaintiff Affidavit at 4. After the June 1994 evaluation and the evaluation meeting between Carolyn Hooper and Plaintiff,

Carolyn Hooper's treatment of Plaintiff as an employee changed. Prior to June 1994, Carolyn Hooper's attitude had changed but had not yet resulted in heightened scrutiny of Plaintiff's job performance. Plaintiff Affidavit at 4.

On September 12, 1994, Carolyn Hooper met with Plaintiff to discuss certain matters related to his job performance. On October 3, 1994, Carolyn Hooper visited the Vinton Center on October 5, 1994, Carolyn Hoooper wrote a follow-up letter to Plaintiff wherein she outlined the topics that had been discussed at the September meeting. There was no discussion of the Vinton Center at the September meeting, or in Carolyn Hooper's letter dated October 5, 194. Plaintiff Affidavit at 4.

However, on October 7, 1994, Carolyn Hooper placed Plaintiff on probation primarily because of the poor condition of the Vinton Center. Prior to Plaintiff's probation, Defendant had applied for federal funding to do major repairs including replacing the roof and repairing the bathrooms at the Vinton Center. Plaintiff Affidavit at 4, Exhibit C. Sometime prior to October 7, 1994, photographs were taken of the Vinton Center for purposes of applying to the appropriate federal agency for funding to repair the dilapidated Vinton Center. Plaintiff Affidavit at 5, ExhibitC. Defendant's Appendix, Exhibit 9. The condition of the Vinton Center was poor. Plaintiff Affidavit at 5. Plaintiff and his staff kept the Vinton Center as clean and safe as possible considering that the building was in a dilapidated state, the roof was constantly leaking, and bathrooms were in despair. Plaintiff partitioned part of the boys' bathroom that was not functional so as to prevent the children from using it. When the pictures were taken, whoever took the photographs went behind the partition to photograph the part of the bathroom that was not in use. These same photographs as depicted in Defendant's Appendix Exhibit 9 were used against Plaintiff to place him on probation on October 7, 1994. Plaintiff Affidavit at 5.

After successfully completing the ninety-day probation period, Carolyn Hooper recommended, and with Cleo Sims' approval, placed Plaintiff on another probation on January 13, 1995. Exhibit 2. On January 18, 1995, I filed an in-house complaint with Kent Welsh, Personnel Director, pursuant to the open-door policy of

TAP. Two days later, Defendant rescinded the probation per its letter authored by Carolyn Hooper dated January 20, 1995, and stated, "At your next performance appraisal meeting, we will review these concerns as to whether or not improvement has been made." Exhibit 3. On January 23, 1995, Defendant terminated Plaintiff Exhibit 4.

Plaintiff filed a grievance against the Defendant. A grievance panel hearing was held on February 20, 1995. See Defendant's Appendix at Exhibit 9 for transcript of grievance hearing. The grievance panel made a decision on March 3, 1995, holding that Plaintiff's termination was justified; but the panel "strongly recommends that Mr. Mitchell be given consideration for any future positions that may become available at TAP which are compatible with his qualifications." Defendant's Appendix, Exhibit 12, Sims Exhibit 8. Defendant did offer Plaintiff a position as a weatherization worker with much less pay, but Plaintiff refused the position as the pay was much less and he was going to be put on another probationary period, which he felt he would not survive. Defendant's Appendix, Exhibit 12, Sims Exhibit 8; Plaintiff Affidavit at 5.

IV. LAW & ARGUMENT

Defendant claims that Plaintiff has not exhausted his administrative remedies for the retaliation charge, that with regard to his gender discrimination claim, Plaintiff has not met a *prima facie* case pursuant to McDonnel Douglas Corp. v. Green, 411 U.S. 792 (1973), and that there is no casual connection between "protested activity" and his termination; therefore, his retaliatory charge is unfounded. The facts presented create an issue of fact as to all defendant which, therefore, requires Defendant's Motion for Summary Judgment to be denied entirely.

A. Retaliation

Plaintiff's claim of retaliation was filed initially with the EEOC in the Intake Questionaire dated January 24, 1995. Plaintiff Affidavit at 5, Exhibit D. The charge of Discrimination dated January 17, 1995 filed with the EEOC cited the cause of discrimination as "sex." In that Charge, Plaintiff stated, "I believe I was placed on probation and discharged because of my sex, male, in violation of Title VII of the Civil Rights Act of 1964, amended." On June 6, 1996, the EEOC gave Plaintiff the right to sue determination based upon sex discrimination. Plaintiff Affidavit at 6, Exhibit E.

In Nealon v. Stone, 958 F.2d 584, 590 (4th Cir. 1992), the Fourth Circuit stated that although the Court had not considered this question, "[a]ll other circuits that have considered the issue have held that a plaintiff may raise the retaliation claim for the first time in federal court." The Court proceeded to adopt such rule characterizing the "inevitable corollary" of the general rule that Title VII lawsuits may raise all issues "like or related to the issues in the charge and growing out of such allegations during the pendency of the case before the Commission." Id.

In Gupta v. East Texas State University, 654 F.2d 411 (5th Cir. 1991), the Fifth Circuit held that, if retaliation grows out of a charge of discrimination that is already being litigated before the court, there is no need to filed a retaliation charge of discrimination because the District Court has inherit ancillary jurisdiction over the retaliation issue.

In this case, Plaintiff's probation and retaliatory termination were the ultimate example of gender discrimination. Defendant's retaliation against plaintiff grows out of Plaintiff's gender discrimination claim and is a part of such discrimination rather than a wholly separate claim. Plaintiff filed his gender discrimination claim because he was "placed on probation and discharged because of sex...," which are acts of retaliation. Defendant's Appendix, Exhibit 2. Plaintiff has exhausted his administrative remedies regarding his retaliation claim, which is a culmination the "final blow," of gender discrimination.

B. The Standard for Summary Judgment Review

Rule 56 of the Federal Rules of Civil Procedure requires the moving party to "show that there is no genuine issue as to any material fact and that it entitled to a judgment as a matter of law"

A "dispute about a material fact is "genuine'...if evidence is such that a resonable jury could return a verdict for the nonmoving party." Celatex Corp. v. Catrett, 477 U.S. 417, 322-23 (1986).

In Clark v. Coates & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991), the Eleventh Circuit held that Celatex still requires that the moving party bear the burden of showing that there are no genuine issues as to material facts and that the holding merely allows that under certain circumstances the movant may meet its burden without an element of the nonmoving party's claim. In Clark, the District Court granted summary judgment, but the court of appeals reversed, holding that the District Court had erred in finding that the defendant had met it burden of showing the absence of a factual dispute. The District Court had erred in focusing its attention on what it believed the plaintiffs had shown without placing the initial burden on the moving defendant.

In Sischo-Nownejad v. Merced Community College Dist., 934 F.2d 1104, 1111 (9th Cir. 1991), the Ninth Circuit stated:

"The question of an employer's intent to discriminate is a 'pure question of fact.'"...(quoting Pullman-Standard v. Swint, 456 U.S 273, 287-88 (1982)). We require very little evidence to survive summary judgment precisely because the ultimate question is one that can only be resolved through a "searching inquiry" - -one that is most appropriately conducted by the factfinder, upon a fill record.

The Eleventh Circuit has reflected the same analysis, In Pearson v. MacBibb County Hospital Authority, 952 F.2d 1274,1280 (11th Cir. 1992), the court held that even though the employer had offered

evidence of legitimate, nondiscriminatory reasons,

> " Summary judgment is not a proper vehicle for resolving claims of employment discrimination which . . . turn on an employer's motivation and intent." Delgado v. Lockheed-Georgia Co., 815 f.2d 641, 644 (11th Cir. 1987). While Appelles' [sic] offer much in explanation for the adverse employment decisions in question, conflicting evidence in the record nevertheless leaves material issues of fact for resolution.

In Shager v. Upjohn Co., 913 F.2d 398, 402 (7th Cir. 1990), the defendant's articulated reason for the discharge of the plaintiff was that he had failed to meet the employer's legitimate expectations. The plaintiff produced evidence that he was not an inadequate worker and had met legitimate expectations. The Seventh Circuit held that, in adding such proof, the plaintiff had "surmounted the only hurdle that remained to the denial of the employer's motion for summary judgment." The Court noted that "[I]f the only reason an employer offers for firing an employee is a lie, the inference that the real reason was a forbidden one, such as age, may rationally be drawn. This is the common sense behind the rule of McDonnell Douglas, 913 F.2d at 401.' The Seventh Circuit stated in McCoy v. WGN Continental Broadcasting Co., 957 F.2d 368 (7th Cir. 1992), that the general standard of broad review of summary judgment "is applied with added rigor in employment discrimination cases, where Intent is inevitably the central issue." Id. At 370-71.

The party resisting summary judgment is greatly assisted in establishing a genuine issue of material fact in being entitled to "all permissible inferences. Tuck v. Henkle Corp., 973 F.2d 371,376 (4th Cir. 1992) (reversal summary judgment for the employer), cert. denied U.S. ____, 113 S. Ct. 1276 (1993).

In Tuck, the question in the District Court's mind was whether there was evidence that a supervisor, who did demonstrate discriminatory behavior, influenced the decision to discharge. In reversing the granting of summary judgment for the employer, the Fourth Circuit stated:

> In open court the district court below expressed concern over the issue of Heer's [supervisor] age bias whether he influenced Tuck's dismissal, but the court was ultimately persuaded that if Heer did influence Tuck's discharge, such influence was age-neutral. . . . By making this determination, the court denied Tuck the benefit of *all permissible inferences*; it is the jury's job at trial to weigh the evidence, not the court's business to do so at summary judgment.

973 F.2d at 377 (emphasis added). The Fourth Circuit further stated that "courts must take special care when considering a motion for summary judgment in a discrimination case because motive is often the critical issue." Id.

When intent, motive, and credibility are at issue, the District Court should be cautious in granting summary judgment. The Seventh Circuit stated "[t]his standard is applied with added rigor in employment discrimination cases where intent and credibility are crucial issues. "Same v. Aldi., Inc., 61 F.3d 544,547 (7th Cir. 1995) (quoting Sarah v. Sears, Roebuck & Co., 3 F.3d 1035,1038 (7th Cir. 1993);

The Second Circuit's opinion in the Gallo v. Prudential Services, 22 F.3d 1219 (2d Cir. 1994), stated that "when deciding whether this drastic provisional remedy should be taken into account." The court stated that the trial court should be "cautious about granting summary judgment to an employer when intent is at issue." Id. (Citations omitted).

As one last point in review of Defendant's Motion for Summary Judgment in this case, consider Judge Posner's statement in EEOC v. G-K-G, Inc., 39 F.3d 740 (7th Cir. 1994). Judge Posner stated that "the *McDonnell Douglas* standard was intended to make it *easier* for plaintiffs in discrimination cases to resist summary judgment." 39 F.3d at 747 (emphasis added)

C. Plaintiff's Gender Discrimination and Retaliation Claim

Plaintiff's claims of gender discrimination and retaliation rest upon intent, motive, and the credibility of Carolyn Hooper and the credibility of Plaintiff, which the jury will have to assess. Defendant claims that Plaintiff **must** first establish a *prima facie* case by a preponderance of the evidence . . . Defendant's Brief at 15. And if he cannot establish a *prima facie* case, summary judgment must be granted in Defendant's favor. Defendant also argues that there is proof of a legitimate non-discriminatory reason for Plaintiff's termination and no proof of a legitimate non-discriminatory reason for Plaintiff's termination and no proof of anything pretextual for Plaintiff's termination. Defendant's arguments are interesting but rest upon facts that are in controversy. Summary judgment is therefore not appropriate resolution of these matters; only a jury should decide the ultimate fate of Defendant.

One of the hallmarks of the McDonnell Douglas test is a light first burden on plaintiffs. The McDonnell Douglas casee arose in the context of Plaintiff Green reapplying for employment. The Supreme Court stated that the elements of the *prima facie* case were that Green show (1) he belonged to a minority, (2) he applied and was qualified for a job for which applications were being sought, (3) despite his qualifications he was rejected, and (4) after his rejection applications were still being sought with the same qualifications. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The proof of these elements creates a presumption that without more it is more likely than not that the plaintiff suffered discrimination because the proof eliminates the most likely reasons for the employer's adverse action - - the absence of qualifications or an opening. Id.

Defendant claims that because Plaintiff failed to demonstrate that he was replaced by a female, he cannot prove two of the four prongs as cited in McDonnell Douglas.

More specifically, Plaintiff cannot show that he was replaced by a woman and that he cannot prove that he performed his job adequately. And because he cannot meet these two elements of proof, which Defendant incorrectly deems "requirements," then summary judgment is appropriate. The case law and facts are contrary to Defendant's argument.

With regard to the claim that Plaintiff is unable to show that he was replaced be a female, there is no general rule that the plaintiff is precluded from proving a *prima facie* case because the person selected for a vacancy issue was in the same protected class. Kralman v. Illinois Department of Veterans' Affairs, 23 F.2d 150, 155-56 (7th Cir. 1994).

In Tomsic v. State Farm Mutual Ins. Co., 85 F.3d 1472 (10th Cir. 1996), two women were terminated from a training program. The court reversed the District Court's grant of summary judgment, which was based on the women's failure to show that they were replaced by men. The appellate court noted that the "*McDonnell Douglas* structure was never intended to be applied rigidly but instead should be adapted to the varying circumstances presented in particular cases." Id. at 1476. It was sufficient that the women show that they were treated less favorably than their male counterparts. Indeed, retention in the training program was similar to a failure-to-promote case in that those displaced from the program were normally not replaced.

After citing the McDonnell Douglas four-part test, with the fourth element being "replacement of a person outside the protected class," the Court, in Walker v. Nationsbank of Florida N.A., 53 F.3d 1548 (11th Cir. 1995), cautioned:

> Our cases have repeatedly stressed that an overly strict formulation of the elements of a *prima facie* case is to be avoided. See, e.g., Carter v. City of Miami, 870 F.2d 578 , 583 (11th Cir. 1989) (age discrimination plaintiff's inability to show that she was replaced by someone outside of the protected class not an absolute bar to the establishment of a *prima facie* case).

> Whether a *prima facie* case has been established is a face specific inquiry: Would an ordinary ordinary person reasonably infer discrimination if the facts presented remained unrebutted? Carter , 870 F.2d at 583.

Id. at 1556, n. 12.

In this case, Plaintiff was eventually replaced by a man. However, the very heart of this case is if Plaintiff had kept quiet about the sexist comments about men, if he had not spoken out defending himself as a male, if he had not "posed opposition" to Carolyn Hooper's authority, Plaintiff probably would still be working at Defendant as Service Manager. But because Plaintiff challenged Carolyn Hooper, questioned her sexist comments, his work was heavily scrutinized, he did not receive a pay increase despite having a good evaluation, and he was criticized for the poor condition of the Vinton Center, a condition that was entirely out of his control. Plaintiff was eventually fired when Hooper who that the intent and motive reasonably inferred from the facts had enough time to "build a case" against Plaintiff. It matters not in this case that Plaintiff was replaced by a male. It is actually not surprising. As long as the male worker under Carolyn Hooper is subservient, does not question her comments, and does not stand up for his gender, he has a job at TAP.

Defendant also claims that the evidence proves that Plaintiff's job performance was simply horrible and that Plaintiff does not have evidence to the contrary; and therefore, cannot satisfy the second prong of the McDonnell Douglas-Burdine standard of proof namely, that Plaintiff was performing his job adequately.

As in most Title VII cases, like most Defendants in Title VII cases, Defendant claims that Plaintiff's work performance was inadequate and that was the reason, and only reason, why he was terminated. This is certainly a hotly-contested point and is a material fact at issue.

Defendant claims that Plaintiff lacked initiative dating to 1990 when he worked as a maintenance technician; yet promoted Plaintiff to Service Manager in 1992 and gave him a good evaluation in 1994. Defendant claims that Plaintiff was placed on probation on October 7, 1994, because the Vinton Center was in such horrible, unclean, unsafe condition and that Plaintiff was the blame for this poor condition; yet Defendant had applied for federal funding some months before to repair the dilapidated Vinton Center, received federal funding and then later closed the Vinton Center because of bad condition. Plaintiff Affidavit at 4, Exhibit C. Defendant used pictures of the Vinton Center that were taken when Defendant applied for federal funding against Plaintiff stating that he failed to do. Plaintiff Affidavit at 5, Exhibit C.

Contrary to Plaintiff's statement, Carolyn Hooper claimed to have taken these pictures of the Vinton Center on her visit to the center on October 3, 1994, yet failed to mention the pictures in her memo to Plaintiff dated October 5, 1994, and failed to mention the Vinton Center all despite listing several times that she wanted Plaintiff to repair and handle. Defendant place Plaintiff on probation two days later - - after the October 5 memorandum – primarily for his failure to maintain the Vinton Center, yet had not mentioned it to him before.

Plaintiff's job performance is at issue, it is a genuine issue, and the facts proved by Defendant and by Plaintiff are at issue. Defendant's Motion for Summary Judgment must therefore be denied.

With regard to the discriminatory remarks by Carolyn Hooper, Hooper states that she made the statement, "men are dogs," that she said it on one occasion, and that it was made over one year before Plaintiff was terminated. Defendant's Appendix, Exhibit 5 at 3. Plaintiff states that Hooper made the statement, "all men are dogs," on several occasions before his promotion to Service Manager and after. Plaintiff Affidavit at 3. Further, Plaintiff states that Hooper stated at a staff meeting that, "men are harder to deal with than women." Plaintiff Affidavit at 3. In Defendant's answers

to Interrogatories, Defendant stated that Hooper "voluntarily participated in counseling to moderate the anger she felt after being the victim of a stabbing." Def. Answer to Rog. 13. Exhibit 5. In fact, Hooper had been brutally stabbed and attacked by her boyfriend and required counseling for her anger toward men. Plaintiff Affidavit at 3.

Plaintiff is entitled to reasonable inferences. Tuck v. Henckle Corp., 973 F.2d 371, 376 (4th Cir. 1992). The jury could find that Hooper had the motive to discriminate against Plaintiff and to get rid of him eventually , that Hooper had the problems dealing with men after she had been stabbed by her boyfriend, that these problems dealing with men transferred to her ability to deal with Plaintiff, especially since Plaintiff challenged her sexist comments about men.

At every stage of the burden of proof scheme of McDonnell Douglas-Burdine, there are issues of fact in this case. The issues focus upon the true intent and motive of Carolyn Hooper and why she recommended the probation and then the termination of Plaintiff. Issues also focus upon the credibility of the parties. Intent, motive, and credibility should be left to the trier of fact to assess and determine.

With regard to Plaintiff's retaliation claim, again, it emanates from Defendant's gender discrimination against Plaintiff. The same issue of material fact apply as cited above. After Plaintiff protested his supervisor's sexist comments, he became a target and his supervisor changed the manner in which she dealt with him. Enhanced scrutiny and the building of a paper record to justify planned disciplinary action are common attributes of schemes to retaliate. See Mead v. United States Fidelity & Guaranty Co., 442 F. Supp.114 (D. Minn. 1977). This is the essence of Plaintiff's retaliation claim, that is he was treated worse after Carolyn Hooper learned of his problem with her sexist comments. Thereafter, Hooper increased her scrutiny of Plaintiff's job performance and proceeded to build a paper trial of his alleged poor job performance.

V. CONCLUSION

For all these reasons cited above, Plaintiff, Edward M. Mitchell, hereby requests that this Court deny Defendant's Motion for Summary Judgment.

EDWARD M. MITCHELL

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Counsel for Plaintiff

CERTIFICATE OF MAILING

I, Bettina C. Altizer, Esq., hereby certify that a true and correct copy of the foregoing Memorandum in Support of Plaintiff's Response to Defendant's Motion for Summary Judgment was mailed to Jonathan Rogers Esq., JONATHAN ROGERS, P.C., P.O. Box 2886, Roanoke, VA 24001-2886, counsel for Defendant, on this 3rd day of September, 1998.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

ROANOKE DIVISION

EDWARD M. MITCHELL,

Plaintiff,

v.

TOTAL ACTION AGAINST POVERTY IN ROANOKE VALLEY/HEAD START

Defendants.

Civil Action No. 96-0787-R

MEMORANDUM OPINION

By: James C. Turk,
United States District Judge

This matter is before the Court on motion of the defendant Total Action Against Poverty in Roanoke Valley/Head Start ("Head Start") for summary judgment. Plaintiff Edward M. Mitchell ("Mitchell") filed a complaint in this Court against Carolyn Hooper ("Hooper"), Cleo C. Sims ("Sims"), and Head Start alleging sexual discrimination, retaliation and harassment in violation of 42 U.S.C. 2000e et seq., 42 U.S.C. 1981 and 42 U.S.C. 1985. Defendant filed a motion to dismiss in various grounds pursuant to F.R.C.P. 12(b)(6), and in response plaintiff filed an amended complaint dropping Hooper and Sims as defendants and abandoning his sexual harassment claim and his claims under 42 U.S.C. 1981 and 42 U.S.C. 1985. Plaintiff proceeded against defendant Head Start on his sexual discrimination and retaliation claims, and defendant filed this motion for summary judgment.

Upon review of the record, the applicable law, and the arguments of counsel, the Court finds that defendant is entitled to summary judgment.

I.

Plaintiff Mitchell was hired by Head Start as a maintenance technician on October 19, 1987. He was promoted to Service Manager on August 17, 1992, and in June of 1993, Hooper became plaintiff's supervisor. On January 23, 1995, plaintiff was fired by Ted Edlich, the President of Head Start, based primarily on documented deficiencies of plaintiff's performance and the recommendation of Hooper. Subsequently, Paul Moyer, a man, was hired to replace plaintiff.

Both plaintiff and Hooper agree that their working relationship was strained. Plaintiff alleges that Hooper made some derogatory statements about men which he challenged. He further alleges that his responses to Hooper's sexist comments angered her, and that as a result she gave him poor performance evaluations, recommended him for probation, and eventually recommended that his employment be terminated.

The gravamen of plaintiff's complaint is that Hooper's statements show that he was fired because he is a man. Plaintiff's retaliation claim is interrelated in that he asserts that his employment was terminated in retaliation for his disapproving responses for Hooper's alleged sexist comments.

II.

Upon motion for summary judgment, the Court must view the facts, and inferences to be drawn from those facts, in the light most favorable to the non-moving party. Matushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,587-88 (1986); Nguyen v. CNA CORP., 44 f.3d

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Plaintiff specifically alleges that Hooper stated that "all men are dogs" and that "men are harder to handle than women."

234,236-7 (4th Cir. 1995). Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as matter of law. Fed. R. Civ. P. 56(c).

In the instant case, plaintiff's sexual discrimination claim cannot survive summary judgment because he cannot establish his *prima facie* case. Specifically, the undisputed facts show that following his discharge plaintiff was replaced by a man.

In this private complaint under Title VII charging sex discrimination, plaintiff may offer actual direct evidence of sexual discrimination or may rely upon the indirect, burden-shifting method of proof developed in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). In order to rely on indirect proof, plaintiff must establish a *prima facie* case. To establish a *prima facie* case, plaintiff must show that (1) he is a member of a protected class, (2) that he was qualified for a position of Service Manager and was performing his job adequately, (3) that he was discharged from his that position, and (4) that he was replaced by someone outside his protected class. *See. e.g.* McDonnell, *supra*, at 792; St.Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993). If plaintiff can make our a *prima facie* case, then an inference of discrimination arises which can be rebutted if the employer produces evidence of a legitimate, non-discriminatory justification for the termination. If the employer successfully rebuts the inference of discrimination, plaintiff, in order to survive a motion of summary judgment, must present evidence creating a genuine issue of material fact that the employer's reasons for termination are merely a pretext for intentional discrimination. St.Mary's Honor Center v. Hicks, 509 U.S. 502,506-7 (1993).

Plaintiff offers no direct evidence of sexual discrimination, so he must satisfy all of the elements of a *prima facie* case under McDonnell Douglas in order to create a rebuttable inference of discrimination. The record shows that plaintiff cannot meet the fourth requirement of the McDonnell Douglas indirect proof scheme because he was replaced by a male. Therefore, no inference of discrimination by the defendant arises, and this Court must grand

defendant's motion for summary judgment with respect to plaintiff's sexual discrimination claim.

With regard to plaintiff's retaliation claim, the record contains no evidence that plaintiff engaged in any protected activity before the termination of his employment, nor did he make any claim of retaliatory discharge to the EEOC. In fact, he filed his sexual discrimination complaint after his discharge. In light of these facts, plaintiff's claims for retaliatory discharge cannot survive defendant's motion for summary judgment. Therefore, the Court will also grant defendant's motion for summary judgment with respect to plaintiff's retaliation claim.

The Clerk of Court is directed to send copies of this Memorandum Opinion and the accompanying Order to all counsel of record for the parties.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

ROANOKE DIVISON

EDWARD M. MITCHELL,	
Plaintiff,	**Civil Action No. 96-0787-R**
v.	
TOTAL ACTION AGAINST POVERTY IN ROANOKE VALLEY/HEAD START	**MEMOR-ANDUM OPINION**
Defendant.	

By: James C. Turk,
United States District Judge

For the reasons stated in the accompanying memorandum opinion, it is hereby

ADJUDGED AND ORDERED

that defendant Total Action Against Poverty in Roanoke Valley/Head Start's Motion for Summary Judgment is **GRANTED,** This case shall be stricken from the active docket of the court.

The Clerk is directed to strike this matter from the active docket of the Court and to send certified copies of this Order and the accompanying Memorandum Opinion to counsel of record for the parties.

ENTER: This____day of _____, 1998.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was 6/9/99.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date:_____ _____, and a copy of the order denying rehearing appears at Appendix_____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including_____ (date) on _____(date) in the Application No. A_____.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix_____.

[ ] A timely petition for rehearing was thereafter denied on the following date:_____, and a copy of the order denying rehearing appears at Appendix._____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including_____(date) on _____(date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts:**

The opinion of the Unites States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is published.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits Appears at Appendix _____at the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished

The opinion of the _____ court appears
At Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

STATEMENT OF THE CASE

Plaintiff filed a claim with the United States Equal Employment Opportunity Commission on April 25, 1995, citing Defendant had Discriminated against him based upon gender and had retaliated against him because of his gender. On June 6, 1996, the EEOC issued a Dismissal & Notice of Rights, stating that "the Commission is unable to conclude that the information obtained establishes violations of the statues," The EEOC gave Plaintiff the "notice of the right to sue", allowing him ninety days to bring suit.

On August 29, 1996, Plaintiff timely brought suit against Defendant, Total Action Against Poverty in Roanoke/Head Start and employees Carolyn Hooper and Cleo C. Sims.

REASONS FOR GRANTING THE PETITION

Mr. Mitchell feels he is the victim of sexual discrimination and retaliation on the part of Total Action Against Poverty in Roanoke Valley/Head Start. Mr. Mitchell feel there was a bias in the way the United States District Court for the Western District of Virginia Roanoke Division and The United States of Appeals for the Fourth Circuit look at sexual discrimination and retaliation cases involving men as opposed to women. Does the court believe filing such cases do so because they are too sensitive?

Companies are liable for harassment and sexual discrimination, as well as, retaliation when supervisor make degrading remarks and dismiss those employees for respectfully asking those supervisors to stop.

If Mr. Mitchell were a woman, there would be no question he was a victim in the case. Mr. Mitchell asks that women and men be treated equally in these cases. He does not feel this has been the case, and is the reason he is asking for the granting of this petition.

Publisher's Note:

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cument

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 8-27, 1999

CONCLUSION

The petition for a writ of certiorari should be granted

Respectfully submitted,